IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 94-7709

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NATIONAL BASKETBALL ASSOCIATION, ET AL.,

Plaintiffs-Appellees,

v.

CHARLES L. WILLIAMS, ET AL.,

Defendants-Appellants.

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ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTICT OF NEW YORK

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# BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

## STATEMENT OF ISSUE PRESENTED

Whether, after a collective bargaining agreement expires, management may claim the non-statutory labor exemption from the antitrust laws for a labor market restraint for as long as the collective bargaining relationship exists.[1]

## STATEMENT OF THE CASE

1. The National Basketball Association and its member teams ("NBA") on June l7, l994, sued several of their players and their union ("Players") seeking a declaratory judgment that various of their practices do not violate the federal antitrust laws. The

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[1] The United States does not address the district court's alternative ruling that as a matter of substantive antitrust law the challenged practices are not unlawful.

defendants counterclaimed alleging that the practices do violate the antitrust laws and sought preliminary injunctive relief. The district court (Hon. Kevin Duffy) consolidated the matters for trial pursuant to Rule 65(a)(2), F.R.Civ. P., and on July l8, l994, it entered judgment for the NBA. The players immediately appealed, and this Court on July 2l, l994, granted their motion to expedite the appeal.

2. In l988 the NBA and the players signed a collective bargaining agreement to last until the conclusion of the l993-l994 season. It provided for a draft of eligible college players, the right of first refusal for existing teams when its restricted free agent players sought to sign with another team, and a cap on overall player salaries. Earlier this year the parties started bargaining toward a new agreement, but when the existing agreement expired on June 23, l994, they had not been able to agree on these issues. The players claimed that if management continued the practices it would violate the antitrust laws. Further efforts to negotiate, according to the district court, were unsuccessful. Both parties turned to the court for relief.

The district court after a consolidated preliminary injunction hearing/merits trial ruled for the NBA. Following the Eighth Circuit's decision in Powell v. National Football League, 930 F. 2d l293 (8th Cir. l989). cert. denied, 498 U.S. l040 (l99l), it held that the NBA's nonstatutory labor exemption continues "as long as the collective bargaining relationship exists." Slip op. at 24. Alternatively, the court held on the antitrust merits that the challenged agreements do not violate the antitrust laws. Id. at 25-26.

## ARGUMENT

The district court in following Powell held that after a collective bargaining agreement expires management's nonstatutory labor exemption shields a labor market restraint past the point of bargaining impasse and past management's unilateral imposition of terms.[2] So long as the "collective bargaining relationship exists", so does the exemption.

The United States believes that the Powell standard is overly expansive. The reasons for our position are a matter of public record, expressed at length in a brief we filed in the Supreme Court in support of the petitioners in that case. Powell v. National Football League, S. Ct. No. 89-l42l, Brief for the United States as Amicus Curiae (l990). Since that brief is before the Court, we will summarize here.[3]

Employer-imposed restraints affecting only labor markets are not beyond the scope of the antitrust laws. Gardella v. Chandler, l72 F. 2d 402, 408 (2d Cir. l949)(L. Hand, J.); id. at 4l3 (Frank, J.); Radovich v. NFL, 352 U.S. 445 (l957); Anderson

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[2] There is ambiguity in the NBA's complaint on whether it seeks a declaration merely of its right to continue the existing agreement unchanged until a new collective bargaining agreement is reached, or also of its right to make unilateral changes (consistent with its prior bargaining proposals) once impasse has been reached. See NBA's Amended Complaint, First Claim for Relief, PP. l05 and l00. While this distinction might be argued to be important as a matter of balancing labor and antitrust interests, it is irrelevant under the view of the law in Powell adopted by Judge Duffy.

[3] The Players have submitted copies to the Court, and thus we will not burden the Court with yet more copies.

v. Shipowners Ass'n, 272 U.S. 359 (l926). Rather, such immunity as these restraints enjoy is inferred due to the need to reconcile the antitrust laws with the important congressional policy favoring collecting bargaining expressed in the National Labor Relations Act. Connell Construction Co. v. Plumbers & Steamfitters, 42l U.S. 6l6, , 62l-622 (l975). The broad thrust of that Act, however, is to expand the protection afforded employees. And nothing in the NLRA shows any congressional intent broadly to deprive unionized workers of the antitrust laws' protection from employer-imposed restraints on competition in the labor market. Thus, the immunity should last no longer than clearly necessary to the successful functioning of the statutory labor scheme.

We think that as a matter of logic that point is impasse in the bargaining, for that is the point at which the labor laws let management bring to bear important new legal and economic leverage--such as unilaterally imposing new terms.[4] On the other hand, because impasse is not always readily identifiable and because the labor laws counsel caution in declaring an impasse, the immunity might extend to the point where management unilaterally imposes its terms.

But to extend the immunity even further, as Powell and the district court opinion do, to the end of the collective bargaining relationship forces the union to give up the

[4] The parties appear to differ on whether they have reached impasse. The district court did not resolve the question.

collective bargaining relationship--i.e., be decertified as collective bargaining agent-- in order to claim antitrust rights. While this result seemed not to trouble the district court (Op. at 25), we are convinced that such a rule disserves both labor and antitrust interests and that Congress in enacting a pro-worker statute never intended it.

Therefore, we ask the Court not to affirm the district court's adherence to Powell.

## CONCLUSION

The district court erred in ruling that the NBA's nonstatutory labor exemption continues as long as the collective bargaining relationship exists.

Respectfully submitted.

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AUGUST 1994

CERTIFICATE OF SERVICE

I, Robert B. Nicholson, a member of the bar of this Court, hereby certify that today, the day of August, l994, I caused copies of the accomapnying BRIEF FOR THE UNITED STATES AS AMICUS CURIAE to be served by FAX and also by first-class mail on:

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